83-237

THE SUPREME COURT OF THE UNITED STATES

M. W. ZACK METAL CO., INC.

Petitioner,

- v. -

THE LONDON STEAMSHIP MUTUAL INSURANCE ASSOCIATION LIMITED and NEW CASTLE PROTECTION & INDEMNITY ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND OTHER WRITS UNDER THE ALL WRITS STATUTE

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QUESTIONS PRESENTED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

No.

M. W. ZACK METAL CO., INC., Plaintiff,	
- v. -	No. 83-7159
INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, JANSEN & COMPANY, CONTAM LINIE, HANS H. JANSEN, JURGEN K. KRAFFT, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION and THE LONDON STEAMSHIP MUTUAL INSURANCE ASSOCIATION LIMITED, Defendants.	
M. W. ZACK METAL CO., INC., Petitioner,	
- v. -	
THE LONDON STEAMSHIP MUTUAL INSURANCE ASSOCIATION LIMITED and NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, Respondents.	

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

M. W. ZACK METAL CO., INC., a corporation of Detroit, Michigan, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 4, 1983.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto, as Exhibit "A". A decision was rendered by the District Court on February 18, 1983. It was not reported, but a copy appears in the appendix hereto as Exhibit "B".

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made on April 4, 1983. A timely petition for rehearing en banc, was denied on May 12, 1983

and this petition was filed 90 days of that date. See appendix Exhibit "C". The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

QUESTIONS PRESENTED

1. Was or was not the decision or judgment of the District Court appealed from a final judgment and appealable.

2. Should this Court review on the issuance of a writ to the Supreme Court, State of New York, County of New York its orders and judgments entered since August, 1982 in an action there pending under Index No. 4784-1970 and a proceeding bearing Index No. 28191-82 between the principal parties on this application and which orders materially affect the issues in this matter.

STATUTORY PROVISIONS INVOLVED

Rule 45(d)(f) of Federal Rules of Civil Procedure

Sec. 2304 New York Civil Practice Law and Rules

Rule 3025 New York Civil Practice Law and Rules

Sec. 487 New York Judiciary Law

The foregoing rules are included in the appendix as Exhibit "C".

STATEMENT OF THE CASE

The facts of this case are stated on petitioner's application for a writ under No.82-525 of the October, 1982 term. It is the merits of that case that have given rise to additional reasons why that writ ought to be issued. The pertinent facts are:

Petitioner in January, 1960 shipped a cargo of 93 coils of cold rolled steel sheets usable for automobile bodies it had purchased for resale to the Chrysler Corporation and placed on board the SS Severn River to be carried from Antwerp to the Port of New York. The coils of steel had broken their stow on board the ship and when finally delivered to petitioner they were seriously damaged by the loss of straps

that had been holding them tightly bound and causing them to be unravelled and the edges of the coils were cut, bent and crimped so much so that to salvage the remainder of the coils those edges would have to be uniformly removed, and the resulting coils would become too narrow for use as automobile bodies. The Chrysler Corporation refused delivery. They were sold in bond "as is where is", resulting in a sale below their value to which adding the cost and expense of handling and resale caused a loss of $80,000. to the petitioner. The sale occurred in May, 1960. The ocean carriers, both ship owner and charterer, refused to pay; so did petitioner's own insurer, Federal Insurance Co. Suits were commenced against the ocean carrier and against Federal Insurance Company in separate courts. After two trials in the suit against the Federal Insurance Co. which had resulted in judgments for the plaintiff and were

appealed, the last sending the case back to trial on damages only, a settlement was reached during the third trial by Federal paying $40,000. plus, and it agreed to waive subrogation rights on condition that petitioner would continue its suit against the ocean carriers and out of the net recovery to pay Federal 55% thereof.

Up to the settlement, Federal and the ocean carriers, whose insurers had been collaborating with Federal to defeat petitioner's recovery in the State Court action, continued their collaboration by entering into an agreement for Federal to sell and the ocean carriers to purchase Federal's rights in petitioner's claim against the ocean carriers. That suit was pending in Hamburg, Germany. Their motive for their purchase and sale was so that the ocean carriers could claim in the suit in Hamburg, Germany that they had become the owners of Federal's subrogation rights.

Indeed, immediately after the ocean carriers had received the assignment from Federal they moved in the German Court to be allowed to withdraw that suit claiming to be the owners of petitioner's claim by subrogation. That motion was denied and the German Court did on January 15, 1971 allow recovery to the petitioner of $64,018. against the charterer. On December 7, 1971 the Court awarded a judgment against the ship owner for the same amount, but limited the execution upon the judgment to a levy upon the Severn River. The law in Germany permits of such a limitation when a recovery is had in a maritime cause of action and if the vessel is at the time of the judgment sailing the high seas and is in commercial use. At the time of the judgment against the ship owner, the Severn River had sunk 3 or 4 years previously on rocks in the Far East and was no longer an operating vessel. Counsel for the insurer of the ship owner had concealed this information

from the Court. The same attorney who had concealed that information also represented the charterer. He was employed jointly by the two insurers of the ship owner and charterer.

Appeals were taken by the parties but the ship owner refused to file a bond to stay execution while the charterer offered an undertaking of its insurer Newcastle Protection & Indemnity Association. Newcastle's undertaking stated that they "would pay pursuant to a final decision of a German Court", under a contemporaneous oral agreement that the undertaking was given in exchange for the petitioner's promise to refrain from levying an execution upon the charterer's assets pending appeal. The promise was given and performed by the petitioner and Newcastle delivered its undertaking.

The decision of the German Appeal Court was rendered on January 9, 1975 and it

became final 90 days later when those appellants failed to file further appeals. The decision affirmed the judgment against the charterer but for a reduced sum of $33,000. being the alleged limitation of Cogsa to a recovery of $500. per package, applied to 66 coils which the Appeals Court found were damaged. It dismissed the suit as against the ship-owner because the German Commercial Code limits suits in maritime matters to one year from date of delivery. Delivery had been received on February 16, 1960 but time to sue was extended in writing to May 15, 1961. The suit was timely commenced on May 12, 1961.

The German Appeal Court said that the extension was invalid because the agent who had signed it for the ship did not have authority to sign. Yet he was the agent for the ship at New York and, besides, he had consulted with the ship's insurers and had been given permission by the insurers to

give the extension of time so that he was given the authority to sign for the ship or her owners. Actually the ship's underwriter, the defendant, London Steamship, had taken over the defense of the claim against the owner and an extension had been validly authorized by it. The claim of an invalid signing of the extension induced the German Appeal Court to dismiss the action. It said so. The claim by German counsel was made without proof of facts. In the later trial at New York in the Federal Court, the agent of the insurers conceded that he had given permission to the signer of the extension of time to sue and that the same was binding upon the ship owner and its insurance carrier. Thus, there was a fraud perpetrated not only upon the Trial Court, but also in the Appeal Court by defense counsel.

Pending the appeal in the German Courts, petitioner commenced a suit in admiralty by seizing a sister ship of the

Severn River in the Federal Court at Norfolk, Virginia. That suit was dismissed without a trial upon motion of defense counsel offering an affidavit from the same German counsel who had defrauded the German Courts claiming that the judgment against the ship-owner of December 7, 1971 was an "in rem judgment" which was not so at all. The clear falsity of German counsel's claim was proven by the fact that the suit in Germany was a suit in personam, and the ship had never been seized. The Trial Judge at Norfolk dismissed the suit. It was affirmed by the Court of Appeals. The fraudulent statement in the affidavit was called to their attention but they were ignored.

Next, petitioner filed a motion to restore the suit it had commenced in May, 1961 in the District Court for the District of New Jersey but which was dismissed without prejudice in 1964. Petitioner also sought to amend the libel file to change it

from the ship to her owner, the defendant, International Navigation Corporation of Monrovia. Again, counsel for the defendant appeared and stated untruthfully that the statute of limitations had operated to defeat the claim and that the judgment in Germany was res judicata. Neither of these claims were true. The Court denied the application and the Circuit Court affirmed, no opinion.

In August 1977, petitioner commenced the instant suit in the Southern District Court of New York. The proceeding in that suit and the many falsifications utilized by defense counsel to defeat that suit are stated on the previous application for a writ.

Particularly falacious was defense counsel's claim defeating petitioner's summary judgment motion against Newcastle upon its undertaking by claiming that Newcastle was owed money by Zack and it had

a lien for the debt. The Trial Judge dismissed the fraud count contained in that complaint which was pregnant with issues of fact respecting the fraudulent conduct of German counsel and defense counsel in Norfolk and in New Jersey. The Trial Court merely repeated some of these facts to justify dismissal, but did not succeed. As to the claim against Newcastle it said that it should go to trial because Newcastle claimed it was owed Newcastle and it had a lien for it first. But that claim had not been pleaded in the answer of Newcastle; it had stated only upon a general denial. The claim of the debt and the lien were figments of defense counsel's imagination. No proof was made of their existence. It did not deserve to go to trial but it was ordered to trial and without the jury which was demanded, but before the Court, without the jury.

At the trial on Newcastle's undertaking, the plaintiff proved the breach of the undertaking and without proof that

there was any money owed to Newcastle or that there was a lien in favor of Newcastle, defense counsel rested. Instead, on the motion to dismiss, he claimed that there was no proof of the entry of a German judgment upon the decision of January 9, 1975. The petitioner had proven that there was no practice under German law similar to that under our law that a judgment is entered upon a decision but that the decision according to German law is the last word in German law declaring the rights of the parties. The undertaking itself stated the condition upon paying "pursuant to a final decision of a German Court". The District Court dismissed the suit without prejudice because he said that there was evidence that Newcastle owed Zack money but he could not enter the judgment. This was a pure abnegation of its jurisdiction by the District Court. The case authorities say that an instrument for the payment of money

is breached when it isn't paid upon the happening of the condition precedent. After dismissal of this claim the same defense counsel proceeded to try his alleged counterclaim calling the start of the action, a malicious prosecution, but as he failed to prove his claim the Trial Court dismissed his cross-claim.

Appeals were taken by both petitioner and defense counsel and the Circuit Court affirmed both dismissals, and awarded defense counsel costs.

Defense counsel then proceeded to use falacious statements to the Clerk of the Court of Appeals to induce him to tax as costs those which included the costs of his own cross-appeal. In fact, the majority of the costs that were taxed was for his own use and he is not entitled to that. He entered judgment for $1,376.98. Petitioner moved in the District Court to set the judgment aside and proved the nature of the

unlawful costs that had been allowed. The defense was placed on the false ground that res judicata applied to the decision of the Clerk. There is no such law but the District Court found it to be so and denied the modification or vacatur of the judgment.

Defense counsel then sought to enforce that judgment by serving Subpoenae Duces Tecum as provided by 5224 of the CPLR of New York. In response petitioner moved under 2304 CPLR to quash the subpoena. That proceeding was the New York State all writs statute, but now known as Article 78 of CPLR. Petitioner requested that the subpoenae be quashed because they were served to enforce a judgment obtained by fraud. It was hoped that a trial would be held in the State Court in which petitioner would realize the rightfulness of its attack upon that judgment. Defense counsel argued that the subpoenae as served were Federal subpoenae. The Court did not accept that interpretation

nor did it accept the petitioner's request. It denied the application because it said a judgment obtained by fraud may be set aside only in the Court where the fraud was committed; that, of course, is not the law. Two motions for reargument followed because it was plain that the Judge had violated the State Constitution as well. In Article 6 Section 1 of the State Constitution, the Supreme Court is given complete power over actions at law or suits in equity. A plenary suit to vacate a judgment obtained by fraud is within the competence of equity to decide. The Supreme Court decision refused to exercise that jurisdiction, and error was made. Also, the Court denied petitioner due process of law, as the point expressed by the Court had not been litigated by the parties but the Court acted, sua sponta.

During the prosecution to quash the subpoenae, defense counsel moved to hold petitioner and its counsel for contempt of

Court for failing to answer the interrogatories attached to the subpoenae, despite the fact that the Article 78 proceeding had been timely and duly brought as provided by 2304 CPLR, and despite the fact that Rule 45 FRCP protects a person served with subpoenae, if he has moved before the return date, to quash; see subdivision (d). The motion was argued December 8, 1982. Judge Sweet denied that motion. Judge Sweet asked petitioner's counsel how much time he would want to supply the information. Believing that he had meant how much time after the State Court denied the application, counsel replied 30 days. The Judge then added to the denial of the motion permission to renew, if the answers were not served by June 9, 1982. The State Court made its first decision in the Article 78 proceeding on January 14, 1983. Petitioner lost no time in moving for reargument calling the attention of the Court to its failure to acknowledge

its jurisdiction under the State Constitution. This new motion was made by an order to show cause containing a stay of proceedings of the enforcement of the judgment; it was dated February 15, 1983. That order to show cause was duly served upon the respondents. After that and before a decision was made on the new motion and on February 4, 1983 defense counsel filed a second motion in the District Court to hold petitioner and his counsel for contempt. That action was in violation of the stay contained in the State Court order of February 15, 1983. Petitioner moved to hold the respondents in the Article 78 proceeding for contempt for disobedience to the order of that Court. This new order was duly served upon the respondents.

Defense counsel's motion filed February 4, 1983 was returnable February 18, 1983. That motion was argued on that day

before District Court Judge Sweet. Judge Sweet held the petitioner for contempt of Court and fined it $100. per day for each day the subpoenae remained unanswered. This decision transgresses Rule 45 FRCP.

An appeal was immediately entered and a stay of the fine was obtained from the Circuit Court. The latter, in its decision of April 4, 1983 (Exhibit "B"), dismissed the appeal for lack of appellate jurisdiction. Its reasons are not persuasive as the order appealed from (Exhibit "B") is in all respects a final decision. That presents the first question.

In the Supreme Court, New York County, in August 1982, petitioner sought to supplement the action pending under Index No. 4784-1970, with two new causes of action. The first was the petitioner's claim on Newcastle's undertaking. The second cause of action was under Section 487 of the Judiciary Law of New York, granting a litigant in a

suit a cause of action against lawyers who have deceived the Court. The statute grants treble damages. That new claim was stated against Donald B. Allen who was defense counsel in the Federal Court suit that was dismissed. Recovery for such damages can be had also from the principals of the attorney who had deceived the Court. The parties in the original suit are the same as the parties in the Federal Court and no new party except Mr. Allen was named in the proposed new counts. The motion to the Supreme Court for permission to add the new counts and a party was denied. The Court ignored the proven facts of the petitioner which were proven without contradiction from the defendants. Also, the count to include the claim against the undertaking of Newcastle was not even discussed. Instead, the Court order is a fumbling decision that confuses the fraud count against Mr. Allen with the fraud count contained in the Federal Court complaint.

Moreover, it exhorts the defendants to move to dismiss the complaint utilizing a statute based upon a demand to place the case on the calendar and non-action by the plaintiff. That ground was not applicable and the Court was completely out of order because it may not act as advocate for one of the parties to a litigation. Reargument was requested and these shortcomings in the decision were discussed. A second decision was made which continued the denial but in respect of the claim against Newcastle it conceded that it had not discussed it but said that it, too, should be dismissed because some language of the decision of the Court of Appeals in affirming the Trial Court's dismissal of that claim time-barred the suit because of collateral estoppel. How the Court can make application of collateral estoppel to a decision which dismisses the claim without prejudice it does not otherwise explain and it cannot be explained. It did some more

fumbling about the fraud count and would not recognize that that is controlled by a statute, Section 487 of the Judiciary Law and he could not avoid complying with it. Then, as to the petitioner's claim that he entered litigation as an advocate for a party, he said that that was an attack upon the judiciary and petitioner had violated the Code of Professional Responsibility. That was completely untrue. It did not prove it and it was evidence of a personal predilection by the decision maker to harm and injure the petitioner. A second motion to reargue was made with complete exposition of what due process means and that the decisions were null and void for lack of due process but that claim was ignored in a short form order assessing costs. This is another manifestation of a predilection by the Supreme Court to foist its unlawful decisions upon the petitioner. Accordingly, petitioner moves under the second point to

ask this Court to review that action.

Not only is this Court asked to review the action of the Supreme Court on the motions to supplement the complaint but also the actions of the Court in the Article 78 proceedings. And there is a third proceeding, namely, viz; the contempt proceeding brought against defense counsel. Three decisions were made and all three decisions ignored the facts, decided issues not presented to the Court and even dismissed the Article 78 proceeding with costs though it had been dismissed before without costs. This was further evidence of the personal interest of the decision makers in New York County in the outcome of the suit against the defendants. All proceedings were illustrative of arbitrary action frustrative of the true administration of due process and of the Constitution of the United States.

The three orders denying permission to plead the supplemental causes of action are dated December 6, 1982, February 23, 1983 and April 15, 1983, copies of which are attached to the appendix hereto as a single exhibit marked Exhibit "E".

The three decisions dismissing the Article 78 proceeding are dated January 4, 1983, February 8, 1983 and May 16, 1983. They are attached as a single exhibit to the appendix hereto and marked Exhibit "F".

There were three decisions denying petitioner's motion for contempt against respondents dated March 8, 1983, April 25, 1983 and the third order was inscribed on papers on file, copy of which was not had. It refused to sign an order to show cause to commence a second reargument of the motion for Constitutional error. They are marked as a single exhibit attached to the appendix as Exhibit "G".

REASONS FOR GRANTING THE WRITS

A. In Respect of the First Question, Supra.

The decision of the Second Circuit Court of Appeals quotes Fox v. Capital Co., 299 U.S. 105 (1936). It says that that case denied appealability to an order of civil contempt but that's not all of that case. Judge Cardozo went to the trouble of explaining why in that case the order of civil contempt was not the final order in that case. He recited the many proceedings that were yet open to be determined. In this case there isn't a single solitary new item that can be disputed and decided. Not only did the main case go to final judgment, it was appealed and affirmed by a divided Court in the Court of Appeals but petition for certiorari to this Court was denied. The proceedings to enforce collection of the fraudulent judgment for costs by issuing subpoenae with interrogatories attached as is provided in the Civil Practice Law and

Rules of New York Section 5224 was a single proceeding and it ended with the decision of Judge Sweet holding the petitioner for contempt and fining it $100. per day for each day the interrogatories remained unanswered. Why that case is not a final decision, the Court of Appeals did not say. In the humble opinion of the writer who could be said to be cognizable of the facts of this case, there wasn't a thing that he could do but have that finding of contempt examined by a reviewing Court. The affirmance of the Court of Appeals also transgresses the holding of this Court in Gillespie v. U.S. Steel Corporation, 379 U.S. 148, where it said that finality is to be given a practical rather than a technical construction. Also, Riesman v. Kaplan, 375 U.S. 444, is another case holding that a civil contempt order is appealable. It is not amiss either to call this Court's attention to Mr. Justice Frankfurter's

comments in Rochin v. California, 352 U.S. 165. Mr. Justice Frankfurter said that as the aim of justice was to find the truth of the matter that it was the Court's duty to investigate the question as a scientific research of the facts objectively conducted. The obvious failure of the Court of Appeals to embark into an investigation of the facts in this case is made obvious by the Court's unwillingness to investigate the facts for the truth.

In Cohen v. Beneficial Loan Corporation, 337 U.S. 541, this Court said at page 546, speaking of 28 U.S.C. Section 1291 which requires finality of an order sought to be appealed, "But, the District Court's action upon this application was concluded and closed and its decision final in that sense, before the appeal was taken". This quotation exactly fits the fact situation in this case. The order made was under separate proceeding from the main

action which had been concluded to final judgment. The proceeding had its own beginning and it ended without any other proceedings available to remedy petitioner's loss. That was the order of District Court Judge Sweet dated February 18, 1983. It was born in inequity and it ended in inequity. Judge Sweet transgressed the statutory provisions of Rule 45(b) to come to the conclusion of holding the petitioner for contempt. There were no further proceedings of any kind that were open to be litigated and the Court of Appeals who pronounced the final knell failed to show what further proceedings could be had. Judge Cardozo, in Fox v. Capital Co., supra, went to the trouble of showing why that order was not final. Why couldn't the Second Circuit do the same? The rule of the Second Circuit has been that a civil contempt may be final for appeal purposes. See Vincent v. Local 294 Int'l Bro. of Teamsters, etc., (2 CA)

424 F.2d 124 at page 129; Stringfellow v. Haines, (2 CA) 309 F.2d 910, which was the case in which the main case had already gone to judgment and the civil contempt had followed. The Court simply stated that the civil contempt in that case was final and appealable. Also, New York Telephone v. Comm. Workers of Amer., (2 CA) 445 F.2d at page 46, the Court squarely stated "We hold that the contempts are reviewable as final judgments under Section 1291."

The Court of Appeals in the case at bar did not say that the order appealed from was not the end of the case or that the merits of the case had to be resolved or that such order was an integral part of the case that remained undecided. Not at all. It simply said that a civil contempt is not a final order.

A civil contempt appears to be a common occurrence in the Federal District Courts. Whether there is a conflict of

decisions in the Second Circuit or not, the point is immaterial since the rule seems to hinge upon this Court's rule in Cohen v. Beneficial Loan Corporation, supra. The fact that at the time of the decision of contempt the main case stood decided or that no other proceedings were before the Court unresolved were not given any consideration by the District Court nor by the Court of Appeals. In fact, the decision of the Court of Appeals appears to deny due process.

The party affected by a charge of civil contempt has a large stake at interest. A contempt may affect his liberty as well as his property. The matter is of great importance, to him. Here, not only was the District Judge oblivious of his duty not to transgress Rule 45(b), a serious error of Constitutional dimension, but also the Court of Appeals was oblivious of the need to distinguish the orders to be appealed between those which put an end to the rights

of the parties and those which continue to be a part of an on-going litigation.

In fact, the error of the Second Circuit in failing to apply the rules of finality, as stated in the cases recited by this Court, is clear and requires the grant of certiorari. See Helvering v. Wiese, 265 U.S. 614.

B. Should This Court Issue a Writ to Review the Actions of the Supreme Court of the State of New York, County of New York?

This question was brought to mind by a reading of Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 at page 412, stating:

> "It is, then, the opinion of the Court that the defendant who removed a judgment rendered against him by a State Court into this Court, for the purpose of examining the question, whether the judgment be in violation of the Constitution or Laws of the United States, does not commence or prosecute a suit against the state, whatever may be its opinion, where the effect of the writ may be to restore the party to the possession of the thing which he demands. *** We have already seen, that in its origin,

> the judicial power was extended to all cases arising under the Constitution or Laws of the United States, without respect to parties."

Accordingly, as the decisions of the Supreme Court of the State of New York referred to in this application were violative of due process of law and the equal protection of the laws, the writs given to this Court may extend to the Supreme Court of New York to direct its record to be reexamined in this Court. All nine decisions described in this paper are affected by the error of the Court in failing to abide the Constitution. Such decisions are in their present state null and void and have no force and effect. See Brinkerhoff-Faris v. Hill, 281 U.S. 623, 681; Marbury v. Madison, 1 Cranch 137, 179. Also, see Ex Parte Virginia, 100 U.S. at page 346. As a matter of fact, the New York Court of Appeals has held that decisions of its Courts violative of due process are a null and void act. See The Atlas Credit

Company v. Ezrine, 25 N.Y.2d 219, and Morhaus v. The Supreme Court of the State of New York, 299 N.Y. 131. The interest for bringing such State proceedings to this Court is that they affect the same rights of the petitioner arising out of the damage to its cargo of steel abroad the Severn River. We have seen where petitioner has been conducting a fruitless series of litigation in the Courts of Germany, of the District Court at Norfolk, of the District Court in New Jersey, of the District Court for the Southern District of New York, and has pending an action for fraud in a State Court, New York County to recover his damages. Petitioner's insurer, Federal Insurance Company, with the insurers of the ocean carriers consummated fraud in New York where they conspired to and did assign to the ocean carriers the rights of Federal Insurance under their settlement agreement with petitioner under their policy of insurance in which Federal

had waived its subrogation rights and substituted therefor a right to receive 55% of the net proceeds from the suit brought by petitioner against the ocean carrier for the damage to the steel. At the time there was a viable suit pending in Germany for that damage. Upon receipt of the assignment the ocean carriers proceeded to move the Court in Germany for permission to withdraw the suit claiming to be the owners of petitioner's claims by subrogation received from Federal Insurance Company. When this happened petitioner commenced the suit that is now pending in the Supreme Court under Index No. 4784-70. That suit has lain dormant because of the judgments recovered by petitioner in 1971. But collection of its damages has been avoided. Even in the suit brought in the Southern District Court on the original cargo damage claim and on the written undertaking of Newcastle to pay "pursuant to a decision of a German Court"

and for fraud in the prior courts were dismissed, again, by the use of deception upon that court. So that petitioner was forced to supplement that cause of action pending in the State Court to realize the collection of its damages.

In each one of the Courts in which proceedings were brought by petitioner, the defendants have mounted impressive, bold actions of fraud and deceptions upon the Courts to deceive them into making judgments of dismissals though not on the merits of the plaintiff's claim. That plan has continued and in the Supreme Court action at New York the proceedings recently brought there appear to have been fathered by a law assistant writing opinions for the Court which are patently deliberate and arbitrary decisions to insure the Court to favor the defendants. It would be not only in the interests of justice to review the entire record over the 23-year history of the litigation of this claim so that this court may extend the protection of Constitution rights

to the petitioner but also it would seem the interests of the true administration of justice. This Court should recognize, as was stated in Cohens v. Virginia, supra, at page 385:

> "It would be hazarding too much, to assert, that the judicatures of the states will be exempted from the prejudices by which the legislators and the people are influenced, and will constitute perfectly impartial tribunals".

This is the reason why Chief Justice Marshall said that the Constitution is the Law of the Land and that the Supreme Court is its Supreme arbiter.

The adversaries have become so bold as to deny the efficacy of the cases of this Court defining due process and the equal protection of the law. Mr. Allen even said that these arguments by petitioner were mere wrappings of the flag around the claims but had no substance. The rampant dearth of knowledge of Constitutional law in the State judiciary is a disgusting impairment of the State's guarantee to provide a fair and

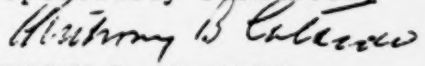
impartial tribunal. If only to vindicate the power of this Court it ought to review not only the recent orders of the Supreme Court of the State of New York but also the action of the Court of Appeals in failing to ascertain that Judge Sweet's order was a final order appealable under the statute and the actions in the same Court which refused to acknowledge the operative violations of the Constitution by Judge Sweet as indicated in the petition for writ to this Court which was denied. On this last procedure there is called to mind the fact that Judge Sweet dismissed a cause of action for fraud, an impossible situation because such cause of action is fraught with fact issues. Also, he denied a jury trial and insisted on trying the claim against Newcastle himself. Also, he abnegated his jurisdiction to go to judgment in that case. Also, he misconstrued the one-year limitation of 09gsa and the applicable principle of estoppel arising

from the fraudulent actions of the defendants in causing the dismissals of timely brought suits. These were Constitutional questions of importance which should not have been committed by the Trial Court. In the final analysis, putting an end to such conniving actions by insurance companies and law firms representing them should be important enough for this Court to review the matter to insure the protection of petitioner's Constitutional rights.

CONCLUSION

It is respectfully requested to issue a writ of certiorari and a writ to review the Supreme Court decisions, and of the denied writ in 82-525.

Respectfully submitted,



ANTHONY B. CATALDO
Attorney for Petitioner

APPENDIX

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EXHIBIT "A"

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of one thousand nine hundred and eighty-three.

Present:

HONORABLE AMALYA L. KEARSE,

HONORABLE LAWRENCE W. PIERCE,

HONORABLE GEORGE C. PRATT,

Circuit Judges,

UNITED STATES COURT OF APPEALS Filed April 4, 1983 A. DANIEL FUSARO, CLERK SECOND CIRCUIT

M. W. ZACK METAL CO., INC.,

Plaintiff-Appellant,

- v. -

No. 83-7159

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, JANSEN & COMPANY, CONTAM LINIE, HANS H. HANSEN, JURGEN K. KRAFFT, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, AND, THE LONDON STEAMSHIP MUTUAL INSURANCE ASSOCIATION LIMITED,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the appeal be and it hereby is dismissed.

Plaintiff M.W. Zack Metal Company ("Zack") appeals from an order of the United States District Court for the Southern District of New York, Robert W. Sweet, Judge, entered on February 18, 1983, granting a motion to hold Zack in civil contempt of the court and imposing on it a fine of $100 per day during its failure to provide information called for in subpoenas that sought information as to Zack's assets in order to enforce a judgment against it. Zack attacks the order on various substantive and procedural grounds which we do not reach since we dismiss for lack of appellate jurisdiction.

An order of civil contempt against a party to an action is neither a final order within the meaning of 28 U.S.C. Sec. 1291, nor an injunctive order within the meaning of 28 U.S.C. Sec. 1292(a); since there have been no certification and leave to appeal pursuant to 28 U.S.C. Sec. 1292(b), the order of which Zack seeks review is not appealable. See Fox v. Capital Co., 299 U.S. 105 (1936) (supplementary proceedings; contempt for failure to disclose assets); see also In re the Attorney General of the United States, 596 F.2d 58, 61-62 (2d Cir. 1979); International Business Machines Corp.

v. United States, 493 F.2d 112, 114-15 & n.1 (2d Cir. 1-73), cert. denied, 416 U.S. 995 (1974).

The appeal is dismissed for lack of jurisdiction.

/s/ Amalya L. Kearse
AMALYA L. KEARSE, U.S.C.J.

/s/ Lawrence W. Pierce
LAWRENCE W. PIERCE, U.S.C.J.

/s/ George C. Pratt
GEORGE C. PRATT, U.S.C.J.

EXHIBIT "B"

ORDER OF DISTRICT JUDGE SWEET
HOLDING PETITIONER FOR CONTEMPT
DATED FEBRUARY 18, 1983.

Upon the papers submitted today and the motion before the Court, the motion to punish the plaintiff for civil contempt is granted, no request for trial, beyond this hearing having been made. The plaintiff will be fined $100 each day the failure to provide the information called for in the subpoenas is outstanding. This matter will be brought before this court on March 11, 1983 to determine the extent of the plaintiff's compliance. It is so ordered. R.W.S.

EXHIBIT "C"

ORDER OF COURT OF APPEALS, EN BANC, DENYING REARGUMENT DATED MAY 12, 1983.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twelfth day of May, one thousand nine hundred and eighty-three.

----------X

M.W. ZACK METAL COMPANY,

Plaintiff-Appellant,

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, JANSEN & COMPANY, CONTAM LINIE HANS H. JANSEN, JURGEN N. KRAFFT, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, AND THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED,

Defendants,

NEW CASTLE PROTECTION & INDEMNITY ASSOC., AND THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
Filed
May 12, 1983
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

No. 83-7159

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for

the plaintiff-appellant, M.W. Zack Metal Company,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by /s/ Francis X. Gindhart
Francis X. Gindhart,
Chief Deputy Clerk

EXHIBIT "D"

STATUTORY PROVISIONS

Rule 45 (d) and (f) of Federal Rules of Civil Procedure

(d) Subpoena for Taking Depositions; Place of Examination. (1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The

subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued. As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948; eff. Oct. 20, 1949; March 30, 1970, eff. July 1, 1970.

Section 2304 New York Civil Practice Law and Rules

Sec. 2304. Motion to quash, fix conditions or modify.

A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is

returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court. Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify.

RULE 3025(b) NEW YORK CIVIL PRACTICE LAW AND RULES.

R 3025.

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

SECTION 487, NEW YORK JUDICIARY LAW.

487. Misconduct by attorneys. An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or * * *

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a Civil action.

EXHIBIT "E"

THREE ORDERS OF SUPREME COURT DENYING MOTION FOR PERMISSION TO SUPPLEMENT COMPLAINT IN FRAUD ACTION.

Dated: December 6, 1982.

STEPHEN G. CRANE J.:

This motion by plaintiff, pursuant to CPLR 3025, seeking an order granting leave to serve an amended and supplemental complaint and to add a new party defendant is denied

The portion of the proposed supplemental complaint that alleges a fraud perpetrated upon various United States Federal Courts and courts in the Federal Republic of Germany has been decided by the United States Court of Appeals for the Second Circuit and, therefore, is precluded by the doctrine of collateral estoppel. There the court held that allegations of fraud should have been raised in the courts where they allegedly occurred. (M.W. Zack Metal Co. v International Navigation Corp. of Monrovia, 675 F2d 525, 529 (1982).

As to any allegation of fraud upon this court in this action (which commenced in 1970), plaintiff'f pleadings consist of no more that conclusory allegation devoid of any substance. They are not shown to have any merit. Therefore, the motion to amend should be denied as to them. (Sharapata v. Town of Islip, 82 AD2d 350, 362 (1981), affd 56 NY2d 332; East Asiatic Co v. Corash, 34 AD2d 432, 436 (1970); see Siegel, New York Practice, S 237, p. 290.) Besides, the proposed supplemental pleading is so remote from the original

action seeking damages to a shipment of steel in January 1960, that if there is any merit to a claim of fraud in this action that caused additional damages, it ought to be brought in a separate action.

Defendants' request for dismissal of the action for failure to prosecute is not passed upon. It may be sought in a formal motion upon compliance with CPLR 3216.

The foregoing constitutes the order and decision of the court.

Dated: December 6, 1982.

S.G.C.

J.S.C.

Dated: February 23, 1983.

STEPHEN G. CRANE J.:

Motion for reargument is granted, and upon reargument the court adheres to its prior decision denying plaintiff's motion for leave to serve an amended and supplemental complaint and add a new party defendant.

In its decision, dated December 6, 1982, the court did not specifically address plaintiff's proposed third and supplemental cause of action. This cause relies on the undertaking of defendant Newcastle Protection & Indemnity Association to pay plaintiff a judgment pursuant to a final decision of the German court. The third cause of action proclaims that this issue was tried in the

United States District Court and the cause of action was dismissed "without prejudice." Plaintiff now contends that the dismissal was not final nor on the merit. But,it was final enough to impel plaintiff to appeal. The Court of Appeals for the Second Circuit affirmed. The majority wrote (M.W. Zack Metal v. Intern. Nav. Corp. of Monrovia, 675 F2d 525 at 530):

> "Finally, Zack contends that the district court erred in dismissing without prejudice its claim for $110,000 from the Insurers under the terms of the Newcastle guarantee. The district court, although recognizing that 'some money is owed by the defendants to plaintiff', dismissed this claim because Zack had failed to establich 'the entry of or the amount of a final judgment in the German courts.' Zack asserts that it presented sufficient evidence below, specifically the Newcastle guarantee and a translated copy of the decision of the Hanseatic Provincial Court in Germany, to establich a present right to recover under the guarantee. We disagree. Zack's evidence established only that the Hanseatic Provincial Court had assessed damages of $33,000 against the Charterer. Zack presented no evidence that an accounting of costs and interest had ever been made by the German appeals court. Accordingly, we agree with the district court

> that Zack has failed to prove that a 'final decision' for purposes of the guarantee has been entered in Germany." (Footnotes omitted)

The "without prejudice" annexed to the dismissal was obviously designed to preserve plaintiff's rights, if any, under the guarantee once a "final decision" is proven. Whatever additional meaning plaintiff seeks to invest in the clause "without prejudice," it simply does not guarantee the right, without any changed circumstances, to turn around and sue again on the still premature claim. Right or wrong, the Second Circuit has estabiliched that the claim now asserted in the proposed third cause of action is not ripe. There is no "present right to recover under the guarantee" (675 F2d at 530). Because plaintiff is collaterally estopped from relitigating the prematurity question, the third cause of action is without merit at this time and should not be interposed.(See Sharapata v. Town of Islip, 82 AD2d 350, 362, affd 56 NY2d 332.)

In a similar failure to embrace the doctrine of collateral estoppel, plaintiff misreads the original decision as it addresses the fourth cause of action. This decision did not hold that plaintiff is precluded from estabiliching fraud on the various courts--"the Federal courts who have dealt with this claim of the plaintiff and this court" (Thirty-Eighth)--on the merits. The decision merely held that plaintiff is precluded from relitigating the question of the proper forums in which such claims may be interposed. The Second Circuit

held such claims must be brought in the forum that was induced by a defendant's fraud to enter an erroneous decision. With respect to a fraud on this court , plaintiff'f proposed fourth cause of action charges Allen with misrepresenting that Burns was not a proper agent of the shipowner or charterer to receive process in this suit. How this in any way misled this court or caused damage to plaintiff is not pleaded. The claim is insufficient and inadequately set forth under CPLR 3016 (b). Interposition of this cause of action may not be allowed. (Sharapata v. Town of Islip, supra: East Asiatic Co. v. Corash, 34 AD2d 432, 436.)

Through a second miereading of the prior decision, where the court denied relief to defendants in the absence of a cross motion and any showing of compliance with the 45-day notice of CPLR 3126, plaintiff's counsel makes a wild and unfounded charge against the court. He charges that the court is advising the defense on the law and is acting with partiality.

Plaintiff's attorney has overstepped the bounds of legitimate advocacy into unehtical and unprofessional conduct. He merits stern rebuke. "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer." Code of Professional Responsibility, DR 8-102 (B).) In this era of unrelenting and unfounded attacks on the judiciary by the press and lay public, it is simply intolerable to suffer similar conduct from an officer of the court. Respective counsel for the defendants are also worthy of criticism. It was their duty to respond to plaintiff's shocking accusation against the court. They have the duty to rally to

the support of adjudicatory officials by responding to unjust criticism in order to enhance public confidence in our legal system. (Code of Professional Responsibility, EC8-6.) Instead, they remained silent.

Dated: February 23, 1983.

S.G.C.

J.S.C.

Dated: April 15, 1983

STEPHEN G. CRANE J.: (Shortform Order)

Upon the foregoing papers this motion for reargument is denied on a separate bill of costs and disbursements to each defendant filing opposing papers.

Dated: April 15, 1983

SGC
JSC

EXHIBIT "F"

THREE ORODERS OF SUPREME COURT, IN ARTICLE 78 PROCEEDINGS.

Dated: January 4, 1983.

DAVID B. SAXE, J.:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - - - - - - - - - - - - - - x

In the Matter of the Petition of ANTHONY B. CATALDO,

Petitioner,

- against -

DONALD B. ALLEN and HILL, RIVKINS, CAREY, LOESBERG, O'BRIEN & MULROY, A Law Partnership,

Respondents,

To Annul and Vacate two Subpoena served upon Petitioner, allegedly in an action in the United States District Court for the Southern District of New York, entitled N.W. ZACK METAL COMPANY, Plaintiff, against INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, JANSEN & COMPANY, CONTAM LINIE, HANS R. JANSEN, JURGEN K. KRAFFT, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION, LIMITED,

Defendants.

INDEX NO. 29191/82

JUDGE DAVID B. SAXE

- x

The application in the form of a Notice of Petition is denied. The movant apparently seeks to quash two information subpoenae issued as a result of a Judgment entered after trial in the United States Federal District Court for the Southern District of New York. His premise is that the subpoenae are void because the underlying judgment was tainted by fraud. That being so, this application should be made at the situs of the judgment (the Federal

Court) which has the power and authority to entertain his claim relating to the judgment. No costs. This decision shall constitute the order of this court.

Dated: January 4, 1983. D.B.S.
J.S.C.

Dated: February 8, 1983

DAVID B. SAXE, J.:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK x

In the Matter of the Petition of
ANTHONY B. CATALDO,

Petitioner,

- against -

DONALD B. ALLEN and HILL, RIVKINS, CAREY, LOESBERG, O'BRIEN & MULROY, A Law Partnership,

Respondents,

INDEX NO. 28191/92

JUDGE DAVID B. SAXE

To Annul and Vacate Two Subpoenae served upon Petitioner, allegedly in an action in the United States District Court for the Southern District of New York, entitled M.W. ZACK METAL COMPANY, Plaintiff, CORPORATION OF MONROVIA, JANSEN & COMAPNY, CONTAM LINIE, HANS. H. JANSEN, JURGEN K. KRAFFT, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATED, LIMITED, Defendants.

x

The movant has not introduced any new facts, or pointed out any legal errors made by this Court upon his motion to reargue. The motion is therefore denied. As stated previously, the movant's application should be made in the Federal Court where the judgment was obtained.

Dated: February 8, 1983.

D.B.S.
J.S.C.

Dated: May 16, 1983.

DAVID B. SAXE, J.

Petitioners second motion to reargue is denied for the same reasons as are set forth in the decision of 2/8/83 denying petitioner's first motion to reargue.

Dated: May 16, 1983.

D.B.S.
J.S.C.

EXHIBIT "G"

TWO ORDERS OF SUPREME COURT, DENYING MOTIONS FOR CONTEMPT.

Dated: March 8, 1983

WALLACH, RICHARD W., J.:

SUPREME COURT : STATE OF NEW YORK
SPECIAL TERM : PART I - - - - - - - - X

In the Matter of the Petition of
ANTHONY B. CATALDO,

Petitioner

- against -

DONALD B. ALLEN, et ano.,

Respondents
- X

Index No.
28191/82

Motion No.
71 of
February
25, 1983

WALLACH, RICHARD W., J.:

Petitioner Anthony B. Cataldo, Esq., seeks to hold respondents in contempt for failing to obey a directive of this court contained in an order to show cause dated January 12, 1983 (Saxe, J.) which restrained respondents from taking any further proceedings with respect to two information subpoenae issued in a certain United States District Court (S.D.N.Y.) action pending reargument of petitioner's application to quash the subpoenae here. Prior to issuance and service of that order to show cause, respondents had been granted leave by the federal court to renew their application therein to compel Cataldo to respond to the subpoenae in the event Cataldo failed to provide such answers by January 10, 1983.. On or about February 12, 1983 respondents, in fact, moved in federal court to enforce the subpoenae. On February 18, 1983, the federal court held petitioner's client in contempt for failure to respond to the subpoenae. Meanwhile, petitioner's pending motion for reargument was denied by this court in a memorandum decision published in the New York Law Journal on February 17, 1983 (Saxe, J.).

The court reiterated that petitioner's remedy rested with the federal court.

A review of the record indicates that petitioner has failed to demonstrate that any of his rights or remedies were defeated, impaired, impeded or prejudiced by respondents' actions. Accordingly, Cataldo's application is denied and the petition is dismissed.

The Clerk of this Court is authorized and directed to enter judgment in favor of respondents and against petitioner dismissing the proceeding accordingly.

Dated: March 8, 1983.

R.W.W.
J.S.C.

Dated: April 25, 1983.

WALLACH, RICHARD W., J.:

SUPREME COURT : STATE OF NEW YORK
SPECIAL TERM : PART I

In the Matter of the Petition of
ANTHONY B. CATALDO,

Petitioner,

- against -

DONALD B. ALLEN, et ano.,

Respondents.

Index No. 28191/82

Motion No. 120 of APRIL 6, 1983

WALLACH, RICHARD W., J.:

Motion by petitioner, Anthony B. Cataldo, for reargument of the prior decision of this court dated March 8, 1983,

is granted, and upon such reargument the orignal decision is adhered to with the following clarification.

Cataldo contends that respondent Donald B. Allen and his law firm committed a contempt by violating the temrs of two temporary restraining orders dated January 12 and February 15, 1983. The motion for reargument is defective in failing to supply copies of those orders, as well as a copy of the federal subpoenae. However, in the interest of judicial economy, this court will assume (most favorably to petitioner) that he has accurately described their content.

According to Cataldo, Allen and his law firm violated the restraining orders by moving in the U.S. District Court for the Southern District of New York to hold Cataldo's client, M.W. Zack Metal Company, in contempt on February 4, 1983, at a time when the temporary restraining orders were allegedly in full force and effect. The District Court granted that contempt application, and under constraint of that order Cataldo paid the federal judgment taxed for costs on appeal in the sum of $1,376.98 by check dated February 25, 1983.

It is now clear that the temporary restraining orders of January 12 and February 15, 1983, issued out of this court (Saxe, J.) were void in lacking subject matter jurisdiction and the U.S. District Court properly ignored them. A state court has no jurisdiction to interfere with the collection or enforcement of a federal judgment. As the Supreme Court of the United States held in Donovan v. City of Dallas, 377 U.S. 408,413:

Federal court: "Petitioners being properly in a court had a right granted by Congress to have the court decide the issues they presented . . . The Texas courts were without power to take away this federal right by contempt proceedings or otherwise."

Thus these restraining orders were void ab initio. Where a temporary restraining order contains an injunctive provision which the court has no authority to issue, there can be no contempt as a matter of law for its disobedience (DiFate v. Scher, 45 AD 2d 1002).

In view of the unneccessarily scurrilous content of petitioner's papers on this motion (see particularly Cataldo's reply affidavit sworn to April 4, 1983, esp. at pp.7,9, and 12), forty dollars motion costs are awarded in favor of respondents and against petitioner under CPLR 8202. This sum shall be in addition to the fifty dollars which may be taxed as costs by respondents upon entry of the judgment to be settled herein (CPLR 8201; 1825 Reality Co. v. Gabel, 44 M.2d 168, resettlement den. 44 M.2d 767).

Let respondents settle a judgment accordingly dismissing the proceeding.

It is so ordered.

Dated: April 25, 1983.

R.W.W.
J.S.C.